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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No. 679

MARKET STREET RAILWAY COMPANY (a corporation),

Petitioner,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and FRANCK R. HAVENNER, C. C. BAKER, JUSTUS F. CRAEMER, RICHARD SACHSE and FRANK W. CLARK, the members of and constituting the Railroad Commission of the State of California,

Respondents.

ANSWER OF CITY AND COUNTY OF SAN FRANCISCO (RESPONDENT IN SUPPLEMENTARY PROCEEDING) TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

ANSWER OF CITY AND COUNTY OF SAN FRANCISCO (RESPONDENT IN SUPPLEMENTARY PROCEEDING) TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

FOREWORD.

In responding to the constitutional question raised by the petition for a writ of certiorari, we emphasize, at the outset, the purpose sought to be accomplished by the petition. By an adjudication that this fund is its property, and that it has been deprived thereof without due process of law, the petitioner would seek to profit by an illegal rate. The petitioner attempts to set at naught the following three decisions adjudicating that the rate which the petitioner collected was excessive and unlawful:

(1) The order of the Railroad Commission of the State of California reducing the fare charged on the petitioner's street car system from seven cents to six cents;

(2) The decision of the Supreme Court of the State of California upholding that order of the Railroad Commission;

Market St. Railway Co. v. Railroad Commission (1944), 24 Cal. (2d) 378, 150 Pac. (2d) 196;

(3) The decision of the United States Supreme Court in affirmance of the decision of the Supreme Court of the State of California;

Market St. Railway Co. v. Railroad Commission (1945), 324 U.S. 548, 65 S. Ct. 1020, 89 L. Ed. 1171.[1]

Thrice has the seven cent fare charged by the petitioner been declared an illegal exaction from its patrons. This fare was actually collected by the petitioner during the time herein involved and accomplished by means of a stay order of the Supreme Court of California. If successful in the present proceeding, the petitioner would achieve the startling consequence of retention by it of a large sum of money derived in entirety from a rate declared exorbitant, unreasonable and unlawful in the three adjudications to which we have referred.

THE FACTS.

It will be of aid to the Court to summarize the record more clearly than appears in the petition.

The Market Street Railway Company, the present petitioner, was since January 1, 1939, charging a street car fare in the sum of seven cents per ride upon its transportation system operated in the City and County of San Francisco. (Rec. 23).[2]

In a proceeding before the Railroad Commission of the State of California, it was determined by that body that the Market Street Railway Company was,

[1]Rehearing denied in 324 U. S. 890, 89 L. Ed. 1438.

[2]All references to the record are to the pages of the printed record on this application for certiorari.

through such fare, deriving a return in excess of a reasonable return. (Rec. 51). Accordingly, the Railroad Commission ordered that the fare be reduced to six cents. (Rec. 52-53).

In that proceeding, the City and County of San Francisco appeared and presented evidence in favor of such reduction of fare. (Rec. 20, 149-152).

After the order of the Railroad Commission, and as permitted by California Statute,

Public Utilities Act Sec. 67;
Stats. (Cal.) 1933 p. 1157;
App. to Pet. p. i;

the Market Street Railway Company, on January 20, 1944, filed a petition in the Supreme Court of the State of California to review that order of the Railroad Commission. (Rec. 1-13).

After the issuance of a temporary stay (Rec. 113-115), the Supreme Court of California, on March 8, 1944, issued an order staying the operation of the Railroad Commission order pending the determination of the proceeding. (Rec. 115-119). The order of stay required the issuance of coupons representing one cent to all persons paying the seven cent fare. (Rec. 118). It was further provided in the stay order that in the event of the affirmance by the Supreme Court of California of the order of the Railroad Commission, and in the event that the rate-payers do not claim refunds of the whole amount of the excess payments within six months after final decision of the Supreme Court of California, "the State (of Cali-

fornia) shall be entitled to all such excess charges or monies which petitioner has unsuccessfully attempted to refund, to be paid to it (the State) under such terms and conditions as the Court may hereafter prescribe." (Rec. 118). However, that order, at the conclusion thereof, contained the following reservation of jurisdiction (Rec. 119):

> "This Court retains jurisdiction to alter, amend, modify or supersede this order, on motion of either party, or on its own motion, as the interests of justice may require."

The Market Street Railway Company proceeded to collect the seven cent fare from the 29th of February, 1944 (the date of the initial stay order) until the 29th of September, 1944, the date of acquisition by the City and County of San Francisco of the operative properties of the Market Street Railway Company. (Rec. 167).

Thereafter, in the decisions we have referred to above, the Supreme Court of California and this Supreme Court of the United States both upheld the validity of the order of the Railroad Commission of California, and determined that the six cent fare was not unreasonable or confiscatory.

On April 28, 1945,[3] the City and County of San Francisco filed a petition for a modification of the

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[3]The date of the petition (April 27, 1945), but not the date of filing (April 28, 1945), appears in the printed record. The date of filing is correctly recited in the petition for writ of certiorari. (bottom of p. 15).

above mentioned stay order. (Rec. 149-158).[4] It is true, as noted in the Petition for Writ of Certiorari,[5] that this petition by the City and County of San Francisco sought payment to it of all of the impounded money constituting the difference between the seven cents charged and collected and the six cents determined by the Railroad Commission as a just and proper streetcar fare. However, the Supreme Court of California properly treated the petition of the City and County of San Francisco as praying, in any event, for the payment of the money remaining after refunds to rate-payers.

It is important to note that this petition of the City and County of San Francisco was filed before any definite refund period came into effect.

The mandate from the United States Supreme Court affirming the judgment and decision of the Supreme Court of California (which, in turn, affirmed the order of the Railroad Commission) was received in the Supreme Court of the State of California and spread upon its minutes on the 7th day of May, 1945.

In an order of May 31, 1945, the Supreme Court of California made provision for the steps to be taken by the Market Street Railway Company in the refunding to the streetcar riders of the excess in fare collected by the company during the period of the stay order. (Rec. 164-167). In this order, likewise,

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[4]The details of that petition will hereinafter be presented. (*Infra*, p. 9).

[5]Bottom of p. 15.

there was a reservation of further jurisdiction as to the determination of the person or persons to be ultimately awarded the money remaining on hand after refunds to the couponholders. That order, at the conclusion thereof, provides as follows (Rec. 167):

> "The Court retains jurisdiction to modify this order and to make such further order in this matter as may be deemed necessary or desirable."

The time during which refunds were to be made to the persons paying the excess fares expired December 31, 1945. (Rec. 174).

In addition to the City and County of San Francisco, the Market Street Railway Company filed a petition for the payment to it of the excess money remaining on hand after refunds to the ratepayers. The Market Street Railway Company petition was filed May 9, 1945 (Rec. 162) after the opinion of this United States Supreme Court became final. By briefs and oral argument, the State of California resisted both petitions, claiming that it was the lawful recipient of the fund. (Rec. 175).

The last-mentioned contention need not here be considered. The State of California has accepted the decision of the Supreme Court of the State of California, providing for the payment of this money to the City and County of San Francisco, and has not petitioned for a writ of certiorari.

In petitioner's statement of the case, reference is made to an affidavit to the effect that the petitioner sustained an operating loss during the time herein

involved, after setting up a reserve for the refund of fares. (Pet. top of p. 16).

This is best answered by the comment of the Supreme Court of California to the effect that the stay order obtained by the Company prevented the six cent fare from going into effect; in the words of the Supreme Court of California, if the reduction of fare, as provided for by the order of the Railroad Commission, be considered experimental, the experiment was never tried. (Rec. 178; 171 Pac. (2d) 879). It could be well and successfully argued that with the added impetus of business to be derived by a six cent fare considerably greater revenue would have been gained by the Market Street Railway Company than under the seven cent fare. The Market Street Railway Company was at the time of the Railroad Commission order in active competition with the Municipal Railway System owned and operated by the City and County of San Francisco, with the latter charging a five cent fare. (Rec. 23).

As the Supreme Court of California also indicates, there is serious question as to the accuracy of the financial statement of the petitioner. (Rec. 178; 171 Pac. (2d) 879).

In substance, the petitioner is making an awkward attempt to assail the decisions both of the State of California and of this Supreme Court of the United States holding that the newly-established rate was not confiscatory. Inasmuch as the petitioner submits no argument upon this affidavit, we make no further comment.

THE PETITION OF THE CITY AND COUNTY OF SAN FRANCISCO.

The petition of the City and County of San Francisco recited the acquisition by the municipality of the operative properties of the Market Street Railway Company, the dilapidated condition of the equipment and the intention of the municipality to utilize this fund, if awarded to it, toward the rehabilitation of the system. (Rec. 149-158). Attached to the petition as an exhibit was a copy of a resolution of the legislative body of the municipality to the effect that this money, if paid to the City, would thus be utilized. (Rec. 154-155). There was no denial of the allegations of the petition and the same stood as admitted.

THE DECISION OF THE SUPREME COURT OF CALIFORNIA.

The majority opinion, participated in by five of the seven members of the Supreme Court of California, appears at page 173 of the record.

It is reported as follows:

> *Market Street Railway Company v. Railroad Commission,* 28 A.C. 387,[6] 171 Pac. (2d) 875.[7]

Such opinion is to the effect that the City and County of San Francisco is equitably entitled to this fund and that this fund was not the property of the

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[6]Advance Sheets of the California Supreme Court decisions.
[7]Advance Sheets of the Pacific Reporter (Second Series), Vol. 171 Pac. (2d) Number 4.

Market Street Railway Company. To award the fund, the Court concluded, to the municipality in effect placed the money back in the pockets of the people who created it, the residents of the municipality who paid the excess fare.[8]

This analysis of the substance of the decision is supported by the following excerpts from the opinion of the Supreme Court of California in the matter at bar:

(1) As to the absence of ownership in the fund by the Market Street Railway Company, it was ruled (171 Pac. (2d) at p. 878, bottom of column 2; Rec. 176-177):

> "Legal ownership is not a factor appearing in the present case. The Railroad Commission's order limited the fare to be collected to a six cent base. In the stay order it was recognized that the company should be entitled to the additional one cent for each fare collected pending review only if it prevailed and the commission's order was annulled. That the company should have no legal ownership in the excess in the event of affirmance was recognized in the stay order, namely, in the purpose to prevent loss to the company if the order should be annulled, and in the further provision for refund and disposition of the excess otherwise than to the company in the event of affirmance. The company necessarily accepted the conditions of the order by acceptance of the stay

[8]The affidavit of Paul L. Beck attached as Exhibit B to the Petition of the City and County of San Francisco, and uncontroverted, was to the effect that only 12.82 per cent of the passengers upon the street cars of the Market Street Railway Company were nonresidents of San Francisco. (Rec. 157-158).

(Inland Steel Co. v. United States, supra, 306 U.S. 153, 156, 59 S.Ct. 415, 83 L.Ed. 557), and, in view of affirmance by this court and by the Supreme Court of the United States, it may not now win an amount on a claim of legal ownership to which it was never entitled either under the commission's order or the stay order of this court. Both this court and the Supreme Court of the United States have determined that the company has been accorded due process. It follows that the company was and is not entitled as of right to more than the six cent fare ordered by the commission."

(2) As to the substantial equity in favor of the municipality, it was ruled (171 Pac. (2d) at p. 881, middle of column 2; Rec. 181-182):

"It thus appears that the showing of equity in favor of the city is particularly persuasive in view of the fact that the people of the city, who were for the most part the contributors to the fund, have now acquired the properties furnishing the service and are now responsible to the public for their operation. They are now interested in those properties in a proprietary as well as in a consumer capacity. In this respect they are doubly affected by the disposition of the unrefunded excess fares.

"The transportation problems involved in this entire proceeding are essentially the city's problems. The people of the city are those principally concerned with their solution. The payment of the excess fares was made by them and their claim that the unrefunded balance be made available for improvement in the service is convinc-

ing. The city felt called upon to acquire the Market Street Railway System in such an outmoded and depreciated condition that it would require a vast expenditure of money to put it in repair and keep it in operation. The fund here involved was accumulated by what has been determined to be an unlawful exaction from the patrons of that system. In equity and good conscience it would seem that the fund should be made available for the benefit of those who were compelled to submit to this unlawful exaction even though most of them deemed it unnecessary or inconvenient to pursue the refunds, small individually, but very substantial in the aggregate. The individual refunds averaged about $2.00 and were made only on written application of the claimant under oath at the office of the company. Equitable considerations dictate that the people of the city, who contributed the moneys and who now own and operate the properties which furnished the service when the excess fares were paid, are entitled to have them distributed for their benefit in the rehabilitation of the physical properties which were acquired during the pendency of the review proceeding, and for the improvement of the service afforded thereby. The distribution of the fund in that manner and its application to the purpose specified will inure to the benefit of those whose payments accumulated the fund, including both the people of the city and outsiders who have occasion to avail themselves of the service.

"We therefore conclude that the equities urged by the city should be deemed paramount. Accordingly, its application for modification of the stay order is granted."

ARGUMENT.

I.

THE SUPREME COURT OF CALIFORNIA WAS EMPOWERED TO DETERMINE THE OWNERSHIP OF THE FUND IN CONFORMITY WITH EQUITABLE PRINCIPLES.

Throughout the litigation, the jurisdiction of the Supreme Court of California has been equitable in nature.

Southern California Edison Co. v. Railroad Commission, 6 Cal. (2d) 737, 744-748.

The proceeding involved in

United States v. Morgan (1938), 307 U.S. 183, 83 L.Ed. 1211, 59 S.Ct. 795,

is in all respects similar to that at bar. That case concerned money collected in excess of a charge determined upon by the Secretary of Agriculture under the Packers and Stockyards Act. The Supreme Court of the United States had this to say (307 U.S. at p. 191, 83 L.Ed. at p. 1217, 59 S. Ct. at p. 800):

> "* * * the district court sitting as a court of equity,[9] and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive, it assumes the duty of making disposition of the fund in conformity to equitable principles."

Further, the Court stated (307 U.S. at p. 193; 83 L.Ed. at p. 1218, bottom of col. 2):

> "In taking the payments into custody it acted as a court of equity, charged both with the responsi-

[9]Omitting citations.

> bility of protecting the fund and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. It entered into no contract or understanding with the litigants; it entered into no undertaking as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity for the protection of the litigants and the public, whose interests the injunction and the final disposition of the fund affect."[10]

We speak throughout of the existence of a fund. Even though the money remains in the hands of the utility, with securities deposited in lieu of physical payment into court, the same power and jurisdiction is possessed as if the money were actually on deposit in court.

> *Natural Gas Pipeline Co. v. Federal Power Commission* (C. C. A. 7, 1942), 128 Fed. (2d) 481, 485.

The foregoing case is cited in the opinion of the Supreme Court of California upon the above principle. (171 Pac. (2d) 878; Rec. 176). The doctrine is not questioned by the petitioner.

It is also the rule that an Equity Court, in control of a fund, may adjudicate the rights of persons claiming interests in the fund, although such persons were not originally parties to the action.

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[10]Emphasis throughout is ours.

Natural Gas Pipeline Co. v. Federal Power Commission (C.C.A.7, 1942) (*Supra*), 128 Fed. (2d) 481, 484 (bottom of column 2):

"Where in the progress of a suit in the United States Court, property has been drawn into custody and control, persons claiming interest in or liens upon the property may be permitted to come into court to protect and enforce their claims, even though the court could not have considered or adjudicated their claims if it had not originally impounded the property."[11]

The foregoing cases involved, specifically, proceedings over impounded funds paid in during the pendency of litigation attacking a rate. These decisions effectively answer the petitioner's contention that the City and County of San Francisco has no status in this proceeding. (Pet. p. 31).

II.

A DECISION OF A STATE COURT—THAT A PERSON HAS NOT A PROPERTY INTEREST—IS ORDINARILY AND IN THIS INSTANCE REGARDED AS CONCLUSIVE BY THE SUPREME COURT OF THE UNITED STATES.

We have heretofore called attention to the substance of the decision of the Supreme Court of California. It is in essence that the Market Street Railway Company has no property interest in this fund and that the same equitably should be awarded to the City and County of San Francisco.

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[11]Citing authorities.

The theme of the present petition for a writ of certiorari is that the Supreme Court of California erred as to this determination of absence of property interest and that therefore the petitioner has been deprived of property without due process of law. There is, of course, no claim of a lack of procedural due process. The petitioner's present arguments as to ownership were all advanced and considered in the Supreme Court of the State of California. The petitioner goes no further than to claim that the State court of highest resort erred in its holding on the issue of a property in the fund.

Of course, if such claim of error is sufficient support for a petition for a writ of certiorari, there would be a limitless parade of cases before this court, wherever litigation involves asserted property rights and this court to boundless extent would be sitting as a court of review over the appellate courts throughout the nation. A true conception of this court's jurisdiction prevents this result.

> *Fox River Paper Company v. Railroad Commission of Wisconsin* (1926), 274 U.S. 651, 71 L.Ed. 1276 (affirming the decision in 208 N.W. 266, 189 Wis. 626).

A statute of the State of Wisconsin placed supervisory power in the State Railroad Commission over dams in navigable streams and granted the right to that body to issue or withhold licenses for the erection of such structures. The plaintiffs in error who were riparian owners and who had been denied a license filed a proceeding to review the order of the

Railroad Commission. They contended that as riparian owners they had an absolute property interest, subject to proper regulation by the State. It was held in the State Court that there was no such property interest.

The Supreme Court of the United States affirmed the judgment. This Court held that, in the absence of any evasion of the constitutional issue on the part of the State court, that court's determination that there was no property interest was conclusive. In this connection, it was stated (274 U.S. 657; 71 L. Ed. 657):

> "We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine. It is for the state court, in cases such as this, to define rights in land located within the state, and the 14th Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent.
>
> "We accept as conclusive the state court's view of the nature of the rights of riparian owners. We therefore find in the refusal of the Commission to grant the permit no denial of the property rights of plaintiffs, and hence no violation of the 14th Amendment."

It is equally true, in the case at bar, that the Supreme Court of California has ruled that this petitioner, Market Street Railway Company, has no property interest in this impounded fund. That there

has been no attempt to "forestall" the determination of the constitutional question will be demonstrated by a showing of the thorough reasonableness of that court's conclusion. (*Infra*, p. 21).

Similarly, in

Sauer v. City of New York (1906), 206 U.S. 536, 51 L.Ed. 1176, 27 Sup.Ct.Rep. 686,

the courts of the State of New York held that a property owner had no easement for light, air or access precluding the erection of a viaduct for general vehicular purposes over a street adjoining his property. The Supreme Court of the United States announced that it was bound by the determination of no property interest upon the part of the state court, saying (206 U.S. 546; 71 L.Ed. 1181, middle of column 2):

> "But, as has been said, we are not concerned primarily with the correctness of the rule adopted by the court of appeals of New York and its conformity with authority. This court does not hold the relation to the controversy between these parties which the court of appeals of New York had. It was the duty of that court to ascertain, declare and apply the law of New York, and its determination of that law is conclusive upon this court. This court is not made, by the laws passed in pursuance of the Constitution, a court of appeal from the highest courts of the states, except to a very limited extent, and for a precisely defined purpose."

The opinion then proceeds to set forth the elementary rule that the Supreme Court of the United

States limits itself, in review of state court decisions, to constitutional questions and that where a state court has adjudicated that no property interest exists that holding will be adhered to in the Supreme Court of the United States. The contention that there has been a deprivation of property without due process of law is thus conclusively answered.

Numerous cases are in accord, holding that the issue as to whether or not a property interest exists is one for the state courts. A further case on this subject which reviews a number of others to the same effect is

Tracy v. Ginzberg (1906), 205 U.S. 170, 27 S. Ct. 461, 51 L.Ed. 755.

Here, the plaintiff sued in the State Court claiming a sum of money which the defendant, a trustee in bankruptcy, had derived from the sale of a liquor license. The plaintiff asserted that the bankrupts were not the owners of the license but that he (the plaintiff) was the actual owner thereof. The State Court denied relief to the plaintiff. In answer to the contention that, through this decision, there had been a deprivation of property without due process of law, the Supreme Court of the United States, per Mr. Justice Harlan, stated (205 U.S. at p. 174, 51 L. Ed. 759, bottom of column 2):

> "The plaintiff also insists that by the judgment of the supreme judicial court of Massachusetts he has been deprived of his property without the due process of law guaranteed by the 14th Amendment of the Constitution of the United States. This proposition is without merit. Within the

meaning of that Amendment, the court, by its judgment, did not deprive the plaintiff of property without due process of law. He sought a decree adjudging that he was entitled to the money received by Ginzberg from O'Hearn. The court, proceeding entirely upon principles of general and local law, and giving all parties interested in the question an opportunity to be heard, decided that plaintiff had no right to that money. The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. If we were of opinion, upon this record, that the money received by Ginzberg from O'Hearn really belonged to Tracy,—upon which question we express no opinion,—still it could not be affirmed that the latter had, within the meaning of the Constitution, and by reason of the judgment below, been deprived of his property without due process of law. Under the opposite view every judgment of a state court involving merely the ownership of property could be brought here for review,—a result not to be thought of. The 14th Amendment did not impair the authority of the states, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before them, controverted questions as to the ownership of property, which did not involve any right secured by the Federal Constitution, or by any valid act of Congress, or by any treaty. Within the meaning of that

Amendment, a deprivation of property without due process of law occurs when it results from the arbitrary exercise of power, inconsistent with 'those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.'" (Citing authorities)

III.

UPON LOGICAL GROUNDS, THE SUPREME COURT OF CALIFORNIA HAS HELD THAT THIS PETITIONER IS NOT ENTITLED TO THE FUND AND HAS NO PROPERTY INTEREST THEREIN.

We are not unmindful of the exception incorporated in the extracts from the foregoing authorities. There must be no attempt to "forestall" a decision on the constitutional question by this Court. In other words, there must be no arbitrary adjudication of no property interest, as a pretext for an invasion upon constitutional principles.

The decision under review does not fall within such exception. It presents a sound line of reasoning logically pointing to the conclusion reached by the court. Indeed, under the foregoing authorities, even if this court feels that a contrary conclusion would be reached, were this court itself to determine the issue as to whether the petitioner possessed a property in-

terest, the adjudication of the state court upon that subject would still be considered determinative.

The criticisms of the petitioner go no further than in an attempt to obtain an appellate review upon the merits. This, as we have seen, cannot be accomplished. However, we deem it fitting to reply to petitioner's points upon the merits, so that this court will be satisfied that the proceeding has been decided in good faith and with no attempt to "forestall" the decision of any constitutional question. That is the only possible test that the City and County of San Francisco is called upon to meet. The following discussion will, in our judgment, go even to the length of establishing that the Supreme Court of California has correctly decided the property question—assuming that such were the test we were called upon to meet.

The petitioner maintains that its property is being taken without due process of law because the fund with which we are concerned was its property ever since its appearance in the various fare boxes maintained by the petitioner. (Pet. top of p. 23). We take issue with the assertion that the one cent excess in fare ever became the property of the petitioner. Petitioner's claim of ownership is based upon the fact that it succeeded in obtaining possession of the money. Thus, the petitioner argues that it was "legally authorized * * * to continue to collect seven cents" and that it cannot be maintained that because of any illegality "petitioner did not gain title to the entire fare collected by it." (Pet. middle of p. 23).

This is nothing more nor less than an argument that since the petitioner, by means of the stay order, got its hands upon the money, such money thereupon, through mere possession, became its property. That such argument is specious permits of no doubt. The stay order was a privilege permitted by statute and was extended by the Supreme Court of California in its discretion, for the preservation of the status quo, and at the request of the Market Street Railway Company. The petitioner was not entitled as a matter of right to a stay. The Statute goes no further than to provide that a stay, upon a petition for a writ of review of an order of the Railroad Commission determining a rate, "may" be issued by the Supreme Court of California in its discretion.

Public Utilities Act, Section 68, Subdivision (a);
Stats. (Cal.) 1933, p. 1158;
App. to Pet. p. ii.

It is plain, therefore, that when the petitioner took possession of the excess in fare, during the operative period of the stay order, it did so as a mere custodian.

The petitioner argues that "from the very nature of the transaction", in the payment of a seven cent fare, "it was impossible for six cents out of each fare to become the property of the carrier and one cent of each fare to remain the property of the passenger" and that the passenger received but an evidence of such payment. (Pet. bottom of p. 23 and top of p. 24). Apparently, the petitioner contends that since the passenger did not retain title to the one cent, it

follows that the petitioner obtained title. This, of course, is a *non sequitur*. It is far sounder to state that the petitioner retained possession of the one cent as a mere custodian for delivery to the person or persons ultimately decreed to be the equitable owners thereof.

It is expressly provided in

Public Utilities Act, Section 68, subdivision (d);

Stats. (Cal.) 1933, p. 1159;

App. to Pet. p. v;

that in the event any stay order is issued, the company may be required to pay into court, or to a bank or trust company, "from time to time" the excess money so collected during the period of the stay.

Therefore, had it seen fit to do so, the Supreme Court of California could have required the petitioner to deliver, day by day, the monies derived from the excess in fare to be impounded with the Court's own subordinate and physical custodian. Had such a provision been incorporated in the order of stay and complied with, not even the petitioner would be bold enough to assert that title was gained by it to the excess monies so deposited. However, for the petitioner's convenience, it was permitted to retain the monies and deposit with the Court, in lieu thereof, the required securities.

That this is in all respects to be treated as a fund impounded in the physical custody of the court has been previously demonstrated. (*Supra,* p. 14).

The petitioner argues that the fund became its property because if it were stolen or destroyed by fire the loss would have fallen upon the utility. (Pet. top of p. 24). Nothing would be accomplished by a prolonged discussion of such hypothetical case. Suffice it to say that the petitioner, in any event, and as a mere custodian, would be liable under California law for negligence occasioning the loss of the fund.

Dieterle v. Bekin (1904), 143 Cal. 683, 688, 77 Pac. 664, 666.

Moreover, it is by no means inconceivable that an absolute liability might be imposed upon the petitioner as a custodian, since it elected to obtain a stay order and further elected to retain the fund and deposit securities in lieu thereof instead of bringing out the money to the Supreme Court day by day. It is also well settled under California law that a custodian of money may enter into an obligation which binds him absolutely to pay and the obligation entered into by the petitioner appears to be of that nature.

Barrere v. Somps (1896), 113 Cal. 97, 104, 45 Pac. 177, 179;

Klein v. Baker (1931), 112 Cal. App. 157, 162, 296 Pac. 631, 633;

Transcontinental & Western Air v. Bank of America (1941), 46 Cal. App. (2d) 708, 717, 116 Pac. (2d) 791, 796.

To suggest a holding of liability upon the part of the company in the event of loss by fire or theft does not, therefore, point to the conclusion that the company must have had title.

We submit that nothing has been offered in the petition tending to establish that the petitioner ever acquired title to this fund. The convincing line of reasoning of the Supreme Court of California has not been overcome—to the effect that the petitioner cannot be considered as having gained ownership in money collected in the exaction of an illegal rate.[12]

IV.

RESPONSE TO THE PETITIONER'S CONTENTION THAT THE DECISION OF THE SUPREME COURT OF CALIFORNIA IS NOT AUTHORIZED BY ANY STATUTE OF THE STATE OF CALIFORNIA.[13]

The Supreme Court of California has pointed to the special provision in the California Statutes to the effect that a fund of this type is payable to the State in an instance where a toll-bridge company has money left on hand after refunds of an excess over a lawful rate. (*Market St. Ry. Co. v. Railroad Commission,* 171 Pac. (2d) 880, middle of column 1; Rec. 179). As the Court remarks, this indicates the legislative policy that the State should be the natural beneficiary where the utility serves the people of the State generally as occurs with a toll-bridge company.

Also noted in the decision of the Supreme Court of California is the deletion by the legislature of Cali-

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[12]*Supra,* pp. 10-11.
[13]Pet. pp. 25-30.

fornia in 1933, with references to utilities generally, of the provision that the unrefunded excess shall go to the State. (171 Pac. (2d) 879, bottom of column 1; Rec. 179).

The Supreme Court of California has therefore held, and we think quite properly, that the State law is silent as to the disposition of the unrefunded excess accumulated pending final disposition of litigation attacking a rate-fixing order. The Court has consequently reached the conclusion that the disposition of such fund is subject to the sound discretion of the court under the rule of

United States v. Morgan, 307 U.S. 183, 194, 59 S.Ct. 795, 83 L.Ed. 1211. (*Supra,* p. 13).

This conclusion is manifestly sound.

The various sections of statute reviewed in the petition (pp. 25-30) have nothing to do with the money remaining after refunds. Specific comment as to each section is therefore unnecessary, and would unduly prolong this reply.

That this construction of the state statute must remain as the law of this case and that such construction, even though erroneous, affords due process is well-settled by a long line of decisions of this Supreme Court of the United States.

Neblett v. Carpenter (1938), 305 U.S. 297, 83 L.Ed. 182, 59 S.Ct. 170

is a recent example of the application of this rule. The Insurance Commissioner of the State of Cali-

fornia there instituted a proceeding for the rehabilitation of an insolvent insurance company.

Stats. (Cal.) 1935, p. 540.

It was contended that, by reason of the construction of certain statutes by the Supreme Court of California, the petitioners for certiorari, who were policy holders, were deprived of property without due process of law. This was the answer of the Supreme Court of the United States in the certiorari proceeding (305 U.S. at p. 202; 83 L. Ed. 187, middle of column 2):

> "All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment. We are, therefore, without jurisdiction to review the state court's decision of any of these questions."

There are numerous decisions of the United States Supreme Court in accord with the above and holding that a construction of a state statute, or a decision upon a question of state law, however erroneous, cannot be attacked on *certiorari.*

Arrowsmith v. Harmening, 118 U.S. 194, 196, 30 L.Ed. 243, 6 S.Ct. 1023;

Central Land Co. v. Laidley, 159 U.S. 103, 112, 40 L.Ed. 91, 94, 16 S.Ct. 80;

Iowa C.R. Co. v. Iowa, 160 U.S. 389, 393, 40 L.Ed. 467, 469, 16 S.Ct. 344;

West v. Louisiana, 194 U.S. 258, 261, 48 L.Ed. 965, 968, 24 S.Ct. 650;
McDonald v. Oregon R. & Nav. Co., 233 U.S. 665, 669, 58 L.Ed. 1145, 1148, 34 S.Ct. 772;
McCaughey v. Lyall, 224 U.S. 558, 564, 56 L.Ed. 883, 885, 32 S. Ct. 602;
Enterprise Irr. Dist. v. Farmers Mutual Canal Company, 243 U.S. 157, 165, 61 L.Ed. 644, 649;
Nickel v. State of Nevada (1921), 256 U.S. 222, 65 L. Ed. 900;
American R. Express Co. v. Kentucky, 273 U.S. 269, 273, 71 L.Ed. 639, 641, 47 S.Ct. 353.

V.

THE AUTHORITIES RELIED UPON BY THE PETITIONER DO NOT SUSTAIN ITS POSITION.

We have heretofore observed[14] that even an erroneous decision, either upon general principles of law or in construction of a statute, is not sufficient to raise a constitutional question upon the due process clause. However, the citations in the petition may also be disposed of upon the merits.

Illinois Bell Telephone Co. v. Slattery (C.C.A. 7, 1939), 102 Fed. (2d) 58 (Pet. pp. 18-21) does not pass upon a controversy analogous to that at bar. It is true that that case concerned excess money remaining after refunds to rate-payers but there the

[14] *Supra,* p. 28.

similarity to the case at bar begins and ends. The claimants there were only the State and the utility. No equity comparable to the one possessed by the City and County of San Francisco in the matter at bar was there advanced by the State. The basis of the State's claim in that case was solely upon *bona vacantia,* or abandoned property, escheating to the State. It was held that the common law doctrine concerning such property was not part of the law of Illinois. The Court therefore held that the fund should be awarded to the utility—the only other claimant to the fund—inasmuch as there was a definite provision in the course of the proceeding for the release of the utility after the termination of the refund period. In the case at bar, there was no provision for such release, and the Supreme Court of California, on both appropriate occasions, consistently retained jurisdiction to determine the ultimate recipient of these unclaimed funds.

The above ground of distinction is definitely pointed to by the Supreme Court of California in the instant decision. (171 Pac. (2d) 878; Rec. 176). The petition is not addressed to the line of demarcation thus drawn by the Supreme Court of California.

Moreover (at p. 68 of 102 Fed. (2d), top of column 2), the decision in the cited case was based precisely upon the ground that when the State made claim the refund period had expired. In reaching its determination, the Court said (102 Fed. (2d) at p. 68, middle of column 2):

"* * * when the state made claim there was no longer a debt in existence."

As we have heretofore noted, the City here made timely claim, in that its petition was interposed prior to the commencement of the refund period.

Pacific Gas & Electric Co. v. Railroad Commission (Dist. Ct. Cal.), 16 Fed. Sup. 884

is also cited by the petitioner. (Pet. p. 21). In this case, it was decreed that the rate-fixing order was void. Of course, the impounded money under that circumstance belonged to the utility.

In the companion suits of

Northern Union Gas Co. v. Mayer (Circ. Ct. N. Y. 1909), 171 Fed. 602

and

Standard Gas Light Co. v. Mayer (Circ. Ct. N. Y. 1909), 171 Fed. 604 (Pet. pp. 21-22),

there was no claimant to the unrefunded excess other than the utility.

Thompson v. Consolidated Gas Utilities Corp. (1937), 300 U. S. 55, 81 L.Ed. 510 (Pet. p. 37)

is far afield. The administrative order there held unconstitutional was one which pro-rated the production of natural gas and which was not designed to prevent waste but was, on the other hand, made for the purpose of compelling certain producers to purchase gas from others in order to fulfill their contracts.

At page 11 of the petition, a number of authorities are cited, to the effect that a non-federal ground may be so interwoven with a federal ground as not to

defeat an application for a writ of certiorari. The difficulty of the petitioner's position is that no true federal ground is here interposed.

The petitioner also argues, upon the basis of authority, that a state will not interfere for the benefit of persons holding private rights and the petitioner contends that this doctrine likewise applies to a municipality. However, these authorities do not concern a direct ownership by a state or municipality in utility property as in the manner here, with a consequent equity inhering in its favor as a representative of persons creating the fund.

VI.

THERE IS NO SHOWING OF AN IMPAIRMENT OF AN OBLIGATION OF CONTRACT.

In vague manner, and without citation of authority, the petitioner asserts that it was discharged "from any and all obligations of the operating permit" by virtue of the contract of sale to the City. (Pet. pp. 35-37). Of course, this has nothing to do with the impounded fund which the petitioner held merely as a custodian. The terms of the operating permit are not set forth by the petitioner and we are unable to conceive any theory by which the asserted right to retain this fund is in any way connected with the operating permit or a release of the obligations under which the petitioner held the operating permit.

It is undoubtedly true that in negotiation over the purchase price of the properties of the petitioner an obligation of the petitioner under the terms of the

operating permit was surrendered. But this is entirely unconnected with the possession of funds by the petitioner gained from an unlawful rate.

The petitioner in effect argues that under construction and application of the state statute by the Supreme Court of California, the petitioner's contract of sale to the City has been impaired. This, as a ground for review by certiorari, is definitely rejected by numerous decisions of this Supreme Court of the United States. Many of the cases are reviewed in

Central Land Company v. Laidley (1894), 159 U.S. 103, 110, 40 L.Ed. 91, 94,

where it was claimed that an erroneous construction by the Supreme Court of Appeals of West Virginia of a statute prescribing the form of acknowledgment of a married woman impaired the obligation of a contract evidenced by a certain deed. The Court stated (159 U.S. at p. 110, 40 L.Ed. at p. 94, middle of column 2):

> "The appellate jurisdiction of this court, upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its

> decision would be not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the state has erred in its construction of the statute. As was said by this court, speaking by Mr. Justice Grier in such a case, as long ago as 1847, 'It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary.' Commercial Bank of Cincinnati v. Buckingham, 46 U.S. 5 How. 317, 343 (12:169, 181); Lawler v. Walker, 55 U.S. 14 How. 149, 154 (14:364, 366)."

Various cases along the same line are set forth in the decision.

CONCLUSION.

We therefore urge:

(1) The Supreme Court of California had full equitable powers in determining to whom the fund should be paid.

(2) The decision of the State court that this petitioner did not have a property interest in the fund is to be adhered to in the Supreme Court of the United States.

(3) The Supreme Court of California has logically and reasonably held that the Market Street Railway Company was not entitled to the fund.

(4) This Court will follow the construction of the Statutes of California by the Supreme Court of California in its holding that the Statutes of California are silent as to the manner in which this fund is to be distributed and that, therefore, the Court possesses power to exercise its equitable discretion.

(5) Finally, we respectfully urge that, as the Railroad Commission of California, the Supreme Court of California and the United States Supreme Court all have held, the Market Street Railway Company was not entitled to the differential in streetcar fares between six cents and seven cents. Upon sound reasoning, the Supreme Court of California, in the opinion now subjected to attack, has ruled that the fund be turned over to the City and County of San Francisco, to be used for the rehabilitation of the transportation system that the City now owns, for the benefit of the car-users who created the fund. No reason for the granting of a writ of certiorari in review of this decision appears.

Dated, San Francisco, California,
November 27, 1946.

Respectfully submitted,

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